IN THE BOMBAY HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.331 OF 2003

The Great Eastern Shipping Co.Ltd. ...Petitioner.

vs.

Bharat Petroleum Corporation Ltd. ...Respondent.

Mr.Rafiq Dada with Jitendra Jain, Amit Hariani & Siddharth Hariani i/b/ Hariani & Co., for Petitioner.

Mr.N.G.Thakkar with Sanjay Kothari with Ms.S.John i/b. M.P.Savla & Co., for Respondent.

**CORAM: D.K.DESHMUKH,J.**

**DATED: 1st March, 2005.**

**P.C.**:-

1. By this petition, the petitioner challenges the Award passed by the Arbitral Tribunal dated 12th May,2003. The Arbitral Tribunal has held that they have no

jurisdiction to entertain and try the claim and the counter claim. The facts that are material and relevant for deciding this petition are that the petitioner and the respondent entered into an Agreement for letting on hire the vessel 'Jag Praja' for a period of two years i.e. for the period from 22nd September,1996 to 30th June,1997 and from 1st July,1997 to 30th June,1998, on the terms and conditions contained in the contract. The contract was to come to an end on 30th June,1998, but the period of Charter/contract was extended for one month and two further extensions were admittedly granted. The charter party thus, was valid till 31st August,1998. In September,1998, the Indian Oil Corporation for and on behalf of Oil Industry, floated a tender for Indian Ship Owners for carriage of petroleum products along the Indian Coast on time charter basis for the period of one year commencing from 1st September,1998 to 31st August,1999, on the terms and conditions which were set out in the tender document. The petitioner and others submitted their bids pursuant to that tender. In the meantime, vessel 'Jag Praja' continued to be chartered by the respondent after 31st August,1998 till August,1999. The proceedings that took place pursuant to the tender floated by the Indian Oil Corporation were challenged in this Court in Writ Petition no.1040 of 1999. The

petitioner intervened in that petition. That Writ Petition was disposed of on 20th August,1999. The Court directed that the rate should be fixed by the Tender Evaluation Committee. As the tender was for the period ending 31st August,1999 and as the Writ Petition itself was being decided on 20th August,1999, the Court directed that the Indian Oil Corporation will not be required to enter into a contract for the period from 1st September,1998 to 31st August,1999.

2. It appears that by letter dated 15th March,2000, the petitioner was informed by the Respondent, the rates of hire fixed by the Committee for the period from 1st September,1998 to 31st August,1999. The petitioner was not agreeable to those rates and therefore, the dispute arose between the parties. The petitioner ultimately by letter dated 1st December,2000 invoked the arbitration clause in the agreement between the parties. The arbitral tribunal was thereafter, constituted. The petitioner filed the statement of claim. The respondent also filed the counter claim. On the basis of pleadings of parties, the Arbitral Tribunal framed the issues. Issue nos.1, 2 and 5 are relevant for the present purpose, they read as under:-

**Issue no.1**:- Whether the Hon'ble Arbitral Tribunal has no jurisdiction to adjudicate upon the dispute between the Claimant and the Respondent for the period September,1998 to August,1999 in respect of the vessel Jag Praja for the reasons stated in para 1 of the written statement?

**Issue no.2**:- Whether there is any common practice that if the vessel is not re-delivered at the end of the period mentioned in the time charter the vessel would be governed by the charter party under which originally it was chartered?

**Issue no.5**:- Whether the time charter party dated 6th May,1997 came to an end by efflux of time on 30th August,1998 ?

The Arbitral Tribunal heard the parties only on these issue nos.1,2 and 5 and passed the Award. The arbitral tribunal held that the petitioner had invoked the arbitration clause in the agreement between the parties which was valid before 31st August,1998 and as the dispute between the parties relates to the period subsequent to

31st August,1998, this Arbitral Tribunal which is constituted pursuant to the arbitration clause in the contract which was valid upto 31st August,1998, has no jurisdiction to decide the reference. Therefore, the claim made by the petitioner in the statement of claim, and the counter claim made by the respondent, were dismissed. The present petition is directed against that Award.

3. Learned Counsel appearing for the petitioner submits that the Charter party entered into between the parties was initially valid only till 30th June,1998, admittedly it was extended on the same terms and conditions till 31st August,1999. Learned Counsel submits that clause 4.1 of the Charter party imposes obligation on the respondent to re-deliver the vessel to the petitioner at the end of the period of the charter party, and this re-delivery was to take place after giving 15 days notice. He further submits that clause 23 provides that if at the expiry of the period of charter, the vessel is at voyage, the vessel shall be continued to charter on the same terms and conditions till the completion of the voyage. The learned Counsel submits that the correspondence between the parties show that the charter of the vessel was continued by the respondent

on the same terms and conditions except the rate of hire for the period commencing from 1st September,1998. The learned Counsel specifically referred to the letter dated 5th November,1998 written by the petitioner to the respondent and letter dated 31st December,1998 written by the respondent to the petitioner. He submits that the Charter party was continued for the period commencing from 1st September,1998 on the same terms and conditions except that the parties were negotiating the rate of hire. So far as other terms and conditions are concerned, they continued to be the same, and therefore, according to the learned counsel, the Arbitral Tribunal has committed an error in holding that the Charter party/ agreement entered into between the parties on 6th May,1997 came to an end on 31st August,1998, especially the arbitration clause contained therein. The Learned Counsel submits that the negotiations that were going on between the parties were only about the rate and there was no dispute about other terms and conditions. The parties had agreed that so far as the rate is concerned, whatever rate that may be decided ultimately would be applicable from 1st September,1998 and till the rate is finally decided, the payment on ad-hoc basis would be made by the respondent to the petitioner. Therefore, when the rate is decided, a contract will come into

existence but the terms and conditions of the contract would be the same except the rate.

4. On the other hand, on behalf of Respondent it is submitted that so far as the period after 31st August,1998 is concerned, the petitioner had agreed that the vessel will be hired by the respondent at such a rate as may be fixed by the Committee. The rate was fixed by the Committee and was communicated to the petitioner by letter dated 15th March,2000. As a result of this, new agreement for the period from 1st September,1998 to 31st August,1999 came into existence. According to the learned Counsel, it is clear from the statement of claim that the arbitration clause that was invoked, was under the charter party/ agreement dated 6th May,1997 and not the charter party/Agreement which came into existence between the parties for the period from 1st September,1998 till 31st August,1999 and therefore, according to the, learned counsel the Arbitral Tribunal was perfectly justified in holding that it has no jurisdiction.

5. The arbitral tribunal has held that **“it was submitted by Mr.Dada, learned Counsel for the Claimant, that, even after 1st September,1998 the Respondent had used the said vessel under the said charter party except**

**that the rate clause in the said charter party did not then apply. We do not find it possible to accept this submission. As we see it, on and after 1st September,1998 the said charter party was superceded by a fresh agreement and a term of that agreement was that the charter hire rate would be determined by the Oil Co-ordination Committee of the IOC."** In my opinion, this finding recorded by the Arbitral Tribunal suffers from non application of mind to the material available on record. On record, there is a Fax message sent by the respondent to the petitioner dated 31st October,1998. In that letter the respondent states that "**The extension of existing coastal tanker fleet for APM products for the month of October,98, at 80% charter hire rates, prevailing till 30.6.98, is approved on provisional basis."** This Fax message in my opinion, clearly indicates that the respondent was extending the contract that was existing between the parties till the end of month of October,1998 with the only modification about the rate of hire. If the intention was that for the month of October, a new contract was to be created, the term **"extension of existing coastal tanker fleet"** would not have been used. In fact the subject of this letter is **"Extension of Charter Hire for Coastal Tankers of APM**

**Products for the month of October,1998.”** Another letter, in my opinion, to which the Arbitral Tribunal has not applied its mind in recording the above referred findings, is letter dated 5th November,1998, written by the petitioner to the respondent. The subject of this letter is **”Extension of Charter Hire for Coastal Tankers of APM Products for the month of October,1998.”** In my opinion, clause (a), (b)(iii) and (b)(iv) are relevant, which read as under:-

> (a) We agree that the revised charter hire rate as and when finalised in response to the tender floated by IOC on 1.9.98 would be applicable to those vessels which are selected under the tender with retrospective date 1.9.98.
>
> (b)(iii) Since the tender is not finalised, the owners will be guided by this existing Charter Party terms and conditions.
>
> (b)(iv) The vessels continue to be employed without knowing the charter hire rate since they are still continuing the charter under the

terms and conditions of the existing Charter Party.

On record there is no document which will even indicate that this was not accepted by the respondent. In other words, the respondent has not produced a single document on record to show that the respondent refuted whatever was stated in the letter dated 5th November,1998. It is clear from this letter that the vessel continued to be hired by the respondent for the period subsequent to 31st August,1998 on the same terms and conditions as were contained in the charter party dated 6th May,1997 only subject to the revision or modification of the rate of hire.

6. It is further to be seen that the Arbitral Tribunal has observed that a fresh agreement came into existence for the period starting from 1st September,1998, as the rate of hire was decided by the Indian Oil Co-ordination committee of I.O.C. In my opinion, for the purpose of deciding issue nos.1,2 and 5, the Arbitral Tribunal was not concerned with the rate. What it was concerned with was the other terms and conditions of the contract, especially the arbitration clause. Even assuming that on the committee deciding the rate, a new

contract came into existence, then also that new contract would be about the rate, so far as other terms and conditions are concerned they will continue to be the same.

7. Before the Arbitral Tribunal, it was contended on behalf of the petitioner that even accepting the contention advanced on behalf of the respondent that for the period subsequent to 31st August,1998, the new agreement came into existence and the terms of that agreement were contained in the tender document, then also, there is an Arbitration clause contained therein, and therefore, the Arbitral Tribunal has jurisdiction to decide the dispute. That contention has been rejected by the Arbitral Tribunal by observing that the petitioner has invoked the arbitration clause under the charter party dated 6th May,1997. In my opinion, this finding is also contrary to the material on record. Perusal of letter by which the arbitration clause was invoked, shows that the petitioner narrated the events that took place and in paragraph 10 has stated thus:-

> **'10. In view of the aforesaid we hereby call upon you No.2 on behalf of our clients to pay the balance amount of Rs.43,947,517/- to**

**our clients with respect to the charter hire rate of 'JAG PRAJA' for the period 1st September,1998 to 31st August,1999 within 15 days from the date of receipt of this letter, failing which this notice may be treated as an arbitration notice and Mr.Kishore Sharma is appointed as an Arbitrator by our clients.'**

The above quoted paragraph 10 indicates that the petitioner invoked the arbitration clause but it did not refer to the arbitration clause either in the charter party of 6th May,1997 or the agreement which is supposed to have come into existence for the period subsequent to 31st August,1998. It is pertinent to note here that not only the petitioner made the claim but the respondent also made the counter claim. The arbitration clause in both the agreements are identical, and therefore, in my opinion, it would have been in the interest of justice for the Arbitral Tribunal to hold that even assuming that a fresh agreement has come into existence, as the arbitration clause in both the agreements are identical, the arbitral tribunal has jurisdiction to decide the dispute.

8. The Arbitration clause is to be liberally

construed. The arbitration clause contained in both the agreements as observed above are identical which reads as under:-

> **'45.2 Any dispute or differences between the Owners on the one hand and the Charterers on the other hand arising under this Charter Agreement shall be referred to the Arbitration of three Arbitrators in Mumbai, one to be appointed by the owners and one by the Charterers. The two Arbitrators before proceeding with the Arbitration shall appoint a third Arbitrator, the decision of the Arbitrators by majority, shall be final and binding on both the parties. The provisions of Indian Arbitration and Conciliation Act,1996 and the rules made therein and any statutory modification thereof shall apply to such Arbitration.'**

The arbitration clause provides for resolution of dispute by Arbitration, which arised under this charter party agreement. Perusal of the correspondence on record shows that the charter party was extended from time to time, admittedly, till 31st August,1998 and thereafter

also. Though the rate was decided by the committee, the other terms and conditions were not decided upon, and therefore, it can be said that the dispute arose out of the agreement/charter party of 6th May,1997. It is further to be seen here that as per the terms of charter party of 6th May,1997, the charter party was to come to an end on re-delivery of the vessel. It is an admitted position that after 31st August,1998, re-delivery of vessel did not take place and therefore, there is considerable substance in the submission of the petitioner that in terms of clause 23, the vessel continued to be on hire on the same terms and conditions, except the term as to the hire charges, because there is clear indication that there was dis-agreement about the hire charges. Perusal of the Award, however, shows that the Arbitral Tribunal has totally excluded from its consideration the clause 23 and 4.1 of the Charter party, though it was specifically pressed into service by the petitioner. For all these reasons, therefore, in my opinion, as the Arbitral Tribunal has excluded from consideration the relevant material, the award is in violation of principles of natural justice and therefore, the award is liable to be set aside.

9. Accordingly, issue nos.1, 2 and 5 are answered

as under:-

**Issue no.1**: The Arbitral Tribunal has jurisdiction to adjudicate the dispute between the parties.

**Issue no.2** is answered in the negative.

**Issue no.5**:- The charter party dt.6th May,1997 did not come to an end by efflux of time and it was extended by the parties on the same terms and conditions except the rate of hire.

The petition is disposed of.

1.3.2005 ----